Supreme Court, U.S.
FILED
JUN 24 1996

(2)

No. 95-1592

In the Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL COUSIN, PETITIONER

v.

OFFICE OF THRIFT SUPERVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the court of appeals erred in affirming the order of the Acting Director of the Office of Thrift Supervision, under 12 U.S.C. 1464(d)(4)(A) (1982), prohibiting petitioner from participating further in the affairs of any federally insured depository institution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 73 F.3d 1242. The decision and order of the Acting Director of the Office of Thrift Supervision (Pet. App. A24-A71) and the recommended decision of the administrative law judge (Pet. App. A72-A104) are unreported. The memorandum and order of the district court dismissing petitioner's declaratory judgment action (Pet. App. A107-A113) is reported at 840 F. Supp. 8. The order of the district court dismissing the criminal indictment against petitioner (Pet. App. A114-A115) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1996. The petition for a writ of certiorari was filed on April 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was the chairman and chief executive officer of Cross County Federal Savings Bank, Queens, New York (the Bank), a federally chartered and federally insured savings association regulated by the Office of Thrift Supervision (OTS). In late 1986, Special Agent Kevin McLaughlin, of the Internal Revenue Service (IRS) served a grand jury subpoena on European American Bank, requesting records relating to petitioner's account there. Petitioner was not a target or subject of the grand jury investigation. Pet. App. A5, A77.

Petitioner contacted McLaughlin in response to the subpoena. When they met, on May 27, 1987, petitioner offered to make a monetary contribution to a charity of McLaughlin's choice. Pet. App. A5. McLaughlin informed his superiors at the IRS of the offer, which he took to be an attempted bribe, and he was directed to engage thereafter in an undercover operation to determine if petitioner would follow through with the bribe. *Id.* at A5-A7. On June 9, 1987, in petitioner's office at the Bank, petitioner gave McLaughlin $1750 in cash and a Swiss silver bullion bar. *Id.* at A6, A34.

In early 1988, the IRS served a grand jury subpoena on All Queens Tudor Realty, an entity in which petitioner had a financial interest, as part of its investigation, to determine whether petitioner would engage in further bribery. Pet. App. A6. Petitioner

promptly contacted McLaughlin and, at a meeting at the Bank on February 10, 1988, offered to pay McLaughlin to quash the investigation. *Ibid.* On February 18, 1988, petitioner again invited McLaughlin to his office. There, petitioner gave McLaughlin an envelope containing $6500 in cash and told him that he did not "want to hear" anymore about the investigation. *Id.* at A35.

Shortly thereafter, on his own initiative, petitioner formulated a scheme through which McLaughlin could receive bribes from bank customers. Pet. App. A6. Petitioner said he would "give [McLaughlin] some information on some individuals, [so] that [McLaughlin] could open up a case, and then [petitioner] could arrange for [the individuals] to pay [McLaughlin] money to kill that case." *Ibid.* In furtherance of the scheme, petitioner acquired the Bank's mortgage files on Joan and John Parlante, whom petitioner believed were engaged in tax evasion, and then provided McLaughlin with confidential bank information about the Parlantes without their knowledge. *Ibid.* After a subpoena was served on the Bank for the Parlantes' records and the Parlantes were notified thereof, petitioner suggested to Mrs. Parlante that she could bribe the IRS agent (McLaughlin) into dropping the investigation. *Id.* at A7. Mrs. Parlante initially resisted the idea, but after a meeting with petitioner in which he instructed Mr. Parlante on how to bribe the agent, using Max Fodera (an associate of petitioner and a Bank director) as an intermediary, the Parlantes paid McLaughlin $25,000 to terminate the investigation. *Ibid.*

2. On August 8, 1990, petitioner was charged with multiple counts of bribery in the United States District Court for the Eastern District of New York.

Two days later, the OTS issued an order under 12 U.S.C. 1818(g)(1) temporarily suspending petitioner from his positions with the Bank and prohibiting him from participating in the Bank's affairs.[1] After an administrative hearing, the suspension order was continued pending final disposition of the criminal charges pending against petitioner. Pet. App. A3.

Petitioner's counsel sought to have the criminal charges against him dismissed on the grounds that he was neither physically nor mentally fit for trial. Pet. App. A3. After reviewing petitioner's medical evaluations, the Assistant U.S. Attorney did not object to dismissal on the ground that petitioner was not physically competent to stand trial. *Id.* at A114. The OTS, however, asked the court to make clear that the dismissal would not constitute a "final disposition" on the merits requiring discontinuation of the temporary order of suspension. *Ibid.* Petitioner's counsel advised the court that petitioner had no objection to the incorporation of language to that effect in the order of dismissal. *Ibid.* As entered, the order stated that "the dismissal d[id] not constitute a final disposition of the indictment for the purpose of 12 U.S.C. § 1818(g), is not a dismissal on the merits, and is a dismissal based solely upon [petitioner's] physical condition." *Id.* at A115.

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[1] Section 1818(g)(1) authorizes the OTS temporarily to suspend a thrift officer charged with a crime involving dishonesty or breach of trust punishable by a term of imprisonment exceeding one year if "continued * * * participation by such [officer] may pose a threat to the interests [of the depositors] or may threaten to impair public confidence in" the thrift. 12 U.S.C. 1818(g)(1)(A). The suspension remains in effect until the indictment "is finally disposed of," unless the suspension is terminated earlier by the OTS. 12 U.S.C. 1818(g)(1)(B).

3. Notwithstanding that express proviso, petitioner (apparently recovered from his health problems) returned to the district court on February 5, 1993, seeking a declaration that the dismissal of the indictment was a "final disposition" of the charges against him, and that his temporary suspension was therefore no longer in effect. Pet. App. A4, A110. The district court dismissed that suit, on the ground that petitioner had waived the right to argue that his temporary suspension expired upon the dismissal of the indictment. *Id.* at A112.

4. On May 13, 1993, the OTS instituted an enforcement proceeding against petitioner, under 12 U.S.C. 1464(d)(4)(A) (1982),[2] seeking an order permanently

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[2] The removal and prohibition statute is now codified at 12 U.S.C. 1818(e). Because the conduct at issue in this case occurred prior to the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), however, it is governed by 12 U.S.C. 1464(d)(4)(A) (1982), which authorizes the OTS permanently to bar a thrift officer from future participation in the affairs of any federally insured depository institution if it finds that the officer has

> [1] committed any violation of law, rule or regulation * * *, or has engaged or participated in any unsafe or unsound practice in connection with the association, or has committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such director or officer, and [2] the [OTS] determines that the association has suffered or will probably suffer substantial financial loss or other damage or that the interests of its savings account holders could be seriously prejudiced by reason of such violation or practice or breach of fiduciary duty, or that the director or officer has received financial gain by reason of such violation or practice or breach of fiduciary duty, and [3] that such violation or practice or breach of fiduciary duty is one involving personal dishonesty on the part of such director or officer, or a will-

barring petitioner from participating in the affairs of the Bank or of any other federally insured depository institution. The notice of charges asserted two separate counts of malfeasance warranting petitioner's removal and prohibition. Count I charged that, on two occasions in 1987 and 1988, petitioner bribed an IRS agent to terminate a grand jury investigation, in violation of 18 U.S.C. 201(b)(1)(C). Count II charged that petitioner aided and abetted the crime of bribery by disclosing confidential information concerning the Bank's customers to the same IRS agent and then orchestrating a bribe of the agent by the Bank's customers, in violation of 18 U.S.C. 2(a) and 201(b)(1)(C).

After a three-day hearing, the administrative law judge (ALJ) issued his recommended decision. See Pet. App. A72-A104. As to Count I, the ALJ found that petitioner engaged in bribery in 1988, thus satisfying the "misconduct" requirement of Section 1464(d)(4)(A), Pet. App. A88-A90,[3] but he concluded that the OTS's proof did not establish the "effects" and "culpability" required by the statute, *id.* at A92-

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ful or continuing disregard for the safety and soundness of the association.

Subparts [1], [2], and [3] are commonly referred to, respectively, as the provision's "misconduct," "effects," and "culpability" requirements. See Pet. App. A8.

[3] The ALJ rejected petitioner's assertion that he was entrapped into offering the 1988 bribe. Pet. App. A90-A92. The ALJ observed that it was petitioner who contacted McLaughlin in response to the subpoena on All Queens Tudor Realty, *id.* at A91, and who thereafter "initiated virtually all of the telephone calls and meetings with the agent," *id.* at A92. The ALJ also rejected petitioner's assertion of outrageous government misconduct in connection with the bribery investigation. *Ibid.*

A96. The ALJ found all three statutory requirements met with respect to Count II, however, and on that basis he recommended petitioner's permanent removal and prohibition. *Id.* at A96-A104. Both the OTS and petitioner filed exceptions to the recommended decision.

5. On October 11, 1994, after reviewing the record and the ALJ's recommended decision, the Acting Director of the OTS issued a final decision and order. Pet. App. A24-A71. He accepted the facts found by the ALJ, but also considered other facts of record. *Id.* at A33. In his view, the OTS had successfully established as to both counts all three requirements for permanent removal and prohibition. *Id.* at A43-A60. He concluded, with respect to Count I, (i) that petitioner engaged in "misconduct" by bribing McLaughlin, in violation of 18 U.S.C. 201(b)(1)(C), both in 1987 and in 1988 (Pet. App. A43-A47);[4] (ii) that the interests of the Bank's depositors "could be seriously prejudiced," because petitioner's unlawful conduct on the Bank's premises could result in a loss of public confidence in the Bank, possibly leading to a run on the Bank, and could in addition damage the Bank's credibility with its primary regulator (*id.* at A53-

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[4] The Acting Director concluded that petitioner's conduct also constituted the lesser included offense of offering illegal gratuities (18 U.S.C. 201(c)(1)(A)), which, unlike bribery, does not require proof of corrupt intent. Pet. App. A47-A49. The Acting Director found no support in the record for petitioner's assertion that he lacked predisposition and was induced by McLaughlin to commit the bribery and unlawful gratuity offenses, *id.* at A51-A53, and rejected petitioner's claims of outrageous government misconduct, *id.* at A53.

A59); and (iii) that petitioner's violations demonstrated "personal dishonesty" (*id.* at A59-A60).[5]

As to Count II, the Acting Director accepted the ALJ's findings that petitioner violated the law, engaged in unsafe and unsound practices, and breached his fiduciary duties to the Bank by revealing confidential customer information for the sake of aiding and abetting the bribery of an IRS agent, thereby meeting each of the alternative measures of "misconduct" permitted by Section 1464(d)(4)(A). Pet. App. A61-A66. He concluded further that petitioner's misconduct in revealing confidential customer bank records could seriously prejudice the interests of the Bank's depositors. *Id.* at A66. And, finally, he found that petitioner's conduct involved both personal dishonesty and a willful and continuing disregard for the safety and soundness of the Bank. *Id.* at A66-A67.

Based on those conclusions, the Acting Director issued an order removing petitioner from his positions at the Bank and permanently prohibiting him from participating in the affairs of any federally insured depository institution. Pet. App. A69-A71.

6. The court of appeals denied petitioner's petition for review. Pet. App. A1-A23. It held that the Acting Director's combined investigatory and adjudicative roles "f[e]ll well within the mandates of the Fifth Amendment," *id.* at A15-A17, and rejected peti-

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[5] The Acting Director rejected the ALJ's conclusion that "culpability" requires proof of misconduct *towards the institution*. He observed that while Section 1464(d)(4)(A) may be satisfied by a showing of willful or continuing disregard towards the institution, it also expressly permits proof of culpability through a demonstration of personal dishonesty. Pet. App. A60 & n.23.

tioner's claim that the Acting Director's order was not supported by substantial evidence.

The court found ample support for the Acting Director's conclusion that petitioner violated the law by aiding and abetting an illegal bribe. Pet. App. A17-A20.[6] The court agreed with the Acting Director that Section 1464(d)(4)(A)'s "misconduct" requirement may be satisfied by the violation of any law, whether banking-related or otherwise, Pet. App. A19-A20, and in the court's view the evidence showed that petitioner "conceived of a scheme in which he assisted a government official in the investigation of the potential financial improprieties of County Federal bank customers so that he might ultimately orchestrate the bribery of that government official," *id.* at A18.

The court also affirmed the Acting Director's ruling that the demonstration of the *possibility* of serious prejudice to the interests of the Bank's depositors was sufficient to meet the "effects" requirement of Section 1464(d)(4)(A). Pet. App. A20-A21. Although the court stated that the effect of petitioner's misconduct on the Bank's credibility with its primary regulator (the OTS) would not alone have amounted to serious prejudice, *id.* at A21, it found the record sufficient to support the Acting Director's conclusion, considering that petitioner's misconduct could also injure the depositors' confidence in the Bank. *Ibid.*

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[6] Because it concluded that the prohibition order was fully justified by the illegal actions charged under Count II, the court did not evaluate the Acting Director's findings with regard to Count I. Pet. App. A17.

Finally, the court found that aiding and abetting the bribery of an IRS agent demonstrated "a degree of culpability well beyond mere negligence," Pet. App. A22 (quoting *Kim* v. *OTS*, 40 F.3d 1050, 1054 (9th Cir. 1994)), and concluded, therefore, that the OTS had amply proved petitioner's "culpability" for purposes of Section 1464(d)(4)(A). Pet. App. A21-A22.

Having upheld the Acting Director's permanent order of removal and prohibition, the court of appeals dismissed as moot petitioner's declaratory judgment action challenging the continued effectiveness of the earlier temporary removal order. Pet. App. A23.

ARGUMENT

1. Contrary to petitioner's understanding (Pet. 11-13), the centralization of investigative and adjudicative functions within an agency is not violative of due process. *Winthrow* v. *Larkin*, 421 U.S. 35, 57-58 (1975). Here, Congress expressly authorized the Director of the OTS to issue initial charges and to make the ultimate adjudication of such charges. The Director is not involved in the prosecution of the charges. The constitutionality of that statutory scheme has been upheld by every court of appeals that has addressed the issue. See *Keating* v. *OTS*, 45 F.3d 322, 327-328 (9th Cir.), cert. denied, 116 S. Ct. 94 (1995); *Seidman* v. *OTS*, 37 F. 3d 911, 925-926 (3d Cir. 1994); see also *Simpson* v. *OTS*, 29 F.3d 1418, 1424 (9th Cir. 1994), cert. denied, 115 S. Ct. 1096 (1995).

Petitioner's due process challenge (Pet. 14-20) to the Acting Director's discretionary authority to reject factual findings made by an ALJ is without support in the law. That challenge is, moreover, misplaced in this case, because here the Acting Director expressly accepted the facts relied on by the

ALJ. Pet. App. A33; see also *id.* at A11-A12. That the Acting Director also found certain additional record evidence relevant to his analysis (see *ibid.*) is constitutionally unexceptional.

2. Petitioner's statutory arguments are similarly without merit. Although petitioner asserts (Pet. 20-21) that the Acting Director erred in basing petitioner's removal and prohibition on conduct for which petitioner was not ultimately convicted, the plain language of the statute authorizes removal and prohibition upon proof, *inter alia*, that an officer "has committed" a violation of applicable law. 12 U.S.C. 1464(d)(4)(A) (1982). The statute does not require proof that the officer was prosecuted or convicted. Nor, contrary to petitioner's view (Pet. 22), does the statute require that the offense relate to banking. Rather, the "misconduct" requirement is satisfied by proof of "*any* violation of law, rule or regulation." 12 U.S.C. 1464(d)(4)(A) (emphasis added).[7] Similarly, the statute's culpability requirement does not call for proof that the officer's offense involved personal dishonesty relating directly to the banking institution (see Pet. 22), but may be met, as the court of appeals affirmed (Pet. App. A21-A22), by any offense demonstrating personal dishonesty. See 12 U.S.C. 1464(d)(4)(A).

3. Petitioner argues (Pet. 25-26) that the district court lacked jurisdiction to provide in its order dismissing the indictment against him that such dismissal was predicated on petitioner's poor health and

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[7] Although *Kim* v. *OTS*, *supra*, and *Brickner* v. *FDIC*, 747 F.2d 1198 (8th Cir. 1984), both involved charges of violations of banking laws, neither case held that only a violation of a banking-related law would satisfy the statutory requirement.

was not a final disposition of the criminal charges for purposes of Section 1818(g). Having sought a dismissal of the indictment on health grounds and having accepted the language in question when it was proposed, petitioner is not well placed—now that his health has improved and the statute of limitations has run on most if not all of the criminal charges against him—to contest it. In any event, the imposition of a permanent order of removal and prohibition superseded the earlier temporary suspension, 12 U.S.C. 1818(g)(1)(B)(ii), rendering moot any dispute respecting the continued effectiveness of the temporary suspension.

4. Petitioner's remaining arguments concern the Acting Director's findings of fact. The court of appeals correctly concluded that those findings were supported by substantial evidence. Pet. App. A23. Petitioner's contentions to the contrary relate to the particular facts of this case and do not warrant further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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